IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICAH RUFFIN — APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2007-KA-0695

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE CASES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICAH RUFFIN **APPELLANT**

vs. **CAUSE No. 2007-KA-00695-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Yazoo County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **CAPITAL MURDER** and **ARMED ROBBERY**.

STATEMENT OF FACTS

The Appellant does not appear to challenge the sufficiency of the evidence of his guilt. Nor does he appear to claim that the verdicts returned against him are contrary to the great weight of the evidence. It is therefore unnecessary to set the facts of his guilt out in any detail. Stated briefly, the evidence showed that the Appellant and another individual came into a house in which a dice game was being played and kidnaped, robbed and killed one Tommy Giles.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING TO GRANT AN INSTRUCTION ON THE DEFENSE OF DURESS AS TO THE UNDERLYING FELONY OF THE CAPITAL MURDER CHARGE?

2. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE?

3. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS A STATEMENT?

4. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A CHANGE OF VENUE?

5. WERE THERE CUMULATIVE ERRORS COMMITTED WHICH AMOUNTED TO A DENIAL OF A FAIR TRIAL?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT AN INSTRUCTION ON THE DEFENSE OF DURESS AS TO THE UNDERLYING FELONY OF THE CAPITAL MURDER CHARGE, THE UNDERLYING FELONY HAVING BEEN KIDNAPING

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A CONTINUANCE

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE APPELLANT'S STATEMENTS

4. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR A CHANGE OF VENUE

5. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT AN INSTRUCTION ON THE DEFENSE OF DURESS AS TO THE UNDERLYING FELONY OF THE CAPITAL MURDER CHARGE, THE UNDERLYING FELONY HAVING BEEN KIDNAPING

The Appellant was charged in count one of the indictment with the felony of capital murder, the underlying felony alleged to have been kidnaping. (R. Vol. 1, pg. 5). In Count 2 of the indictment, the Appellant was charged with the armed robbery of the same victim.

The Appellant sought instructions on the defense of duress as to both counts. The trial court granted a duress instruction as to armed robbery, but refused to grant one with respect to the underlying felony of kidnaping. It noted that duress is not an available defense to murder. (R. Vol. 7, 625 - 630).[1]

The Appellant renews his argument here that the defense of duress is available as to an underlying felony in a capital murder case. He presents no authority for that proposition; he says simply that there is no authority contrary to his argument. He does acknowledge, though, that it is indeed the law in this State that duress is not available as a defense to a charge of capital murder. *Fuqua v. State*, 938 So.2d 277 (Miss. Ct. App. 2006).

First of all, while the trial court did indeed find that there was sufficient evidence to warrant the grant of a duress instruction as to armed robbery, we question whether there was sufficient evidence for such an instruction as to capital murder or the underlying felony of kidnaping or for armed robbery. In other words, before reaching the question put to this Court by

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[1] The instruction we have found in the record concerning duress, D-20 (R. Vol. 2, pg. 200), was amended by the trial court. (R. Vol. 7, pg. 630). However, we have not found the amended version in this record. The amendment apparently limited the defense to the charge of armed robbery.

the Appellant, that being whether the defense of duress is available with respect to an underlying felony in a capital murder case, we think the Court should consider first whether that issue is properly before it. In our view, there was insufficient evidence presented to support the grant of instructions on duress.

The Appellant did not testify. He did not testify to any coercion practiced upon him by the other individual involved in the capital murder of Giles. The defense presented was that the Appellant was a person of peaceful disposition.

The testimony relied upon by the Appellant in support of his theory that a duress instruction should have been granted as to the kidnaping element of the capital murder charge came from one of the investigating officers. The Appellant gave a statement. This statement was admitted into evidence as State's Exhibit 10. (R. Vol. 5, pg. 321).

In the course of that statement, the Appellant told the officer that the Strahan, the other man involved in the murder of Giles, the victim, got into a difficulty with Giles in the course of the dice game. Strahan told the Appellant to get Strahan's gun. Strahan struck Giles with a brick several times, knocking Giles to the floor of the house. The Appellant struck Giles one time with the gun, struck him across his back. Strahan then told the Appellant to give him the gun, which the Appellant did. Strahan then told the Appellant to pull a car around, which the Appellant did. The Appellant pulled the car up and opened the trunk.

Strahan then pulled Giles up by the hair and marched him to the car and put Giles into the truck. Strahan then told the Appellant to drive the car, this being because the Appellant was the only one present who had a driver's license. Strahan and some women got into the car, and the Appellant drove. At some point one of the girls told the Appellant to stop. There was a corn field where the Appellant stopped. The Appellant backed the car up a bit. Strahan told the

Appellant to open the trunk. The Appellant did so; Strahan took the unfortunate Giles out of the trunk and marched him into the cornfield and told Giles to sit down. Strahan told the Appellant to give him the gun. Strahan went to the car, and one of the women handed him the gun. The Appellant then took the gun to Strahan. Strahan then fired six shots into Giles' head.

In another statement by the Appellant, State's Exhibit 9, the first one he gave, in which he attempted to greatly minimize his role in Giles' death, the Appellant said he did not try to stop Strahan because he was scared of Strahan. The officer through whom the Appellant's statements were introduced testified that the Appellant indicated that he was scared of Strahan. (R. Vol. 5, 354 - 355).

It may be that the Appellant said he was scared of Strahan. However, in none of the statements made by the Appellant did he say that Strahan had threatened him or assaulted him, or indicated that if he did not assist Strahan he would himself be killed. Indeed, on two occasions the Appellant had the gun that was used to kill Giles. On at least one occasion, the point in time when he left the house to bring the car around, he might have fled the scene. The evidence actually tends to show a willing participation by the Appellant in the commission of the felonies. He struck the victim once, unbidden to do so; he had several opportunities to flee.

It appears that there is some confusion presently as to what circumstances must exist in order to support the affirmative defense of duress. *Smith v. State*, 948 So.2d 474, 478 - 479 (Miss. Ct. App. 2007)(Discussion of various formulations of what circumstances must exist in order to support the defense of duress). However, while there may yet be confusion as to how the defense is to be described, the Court in *Smith* made it plain that, in all events, where a person has a reasonable, legal alternative to violating the law, a chance both to refuse the criminal act and avoid the threatened harm, the defense must fail. *Id.*

Here, as we have pointed out, there was no proof of any threat to the Appellant. In addition to this, he had the opportunity to avoid the commission of the criminal acts and the ability to avoid the (non-threatened) harm. The Appellant might have simply driven off when he was told to back the car up.

That Strahan is said to have told the Appellant to do certain acts is not dispositive on the question of whether duress was involved. Participants in crimes will often tell each other to a thing or another, but this alone would not constitute duress. The Appellant, in his statements, did state that he was scared of Strahan. But even if this were true, this fact, of its own, could not possibly support a duress instruction. There was nothing to show that Strahan ever threatened the Appellant, or that the Appellant was ever in any danger. On the other hand, the Appellant did have the gun, and he did strike Giles with it. There is no claim advanced that the Appellant struck Giles because he was threatened with harm if he did not.

Mere fear is an insufficient basis for a jury instruction on duress. In order to secure such an instruction, there must be an impelling danger that is present, imminent and impending and of such a nature as to induce a well - grounded fear of death or bodily harm if the act is not done. *Walker v. State*, 913 So.2d 198, 234 (Miss. 2005). The facts in the case at bar did not support the defense of duress; the trial court would have committed no error had it denied the instruction on that basis. Since this is so, it is unnecessary to reach the question of whether the defense of duress is available to an element of capital murder.

Assuming for argument that the First Assignment of Error is presented for decision, there is no merit in it.

The claim, as we have said, is that duress is or should be an available defense for an underlying felony in a capital murder case. The Appellant recognizes that duress is not available

as a defense to capital murder, but he says it is with respect to the underlying felony, here kidnaping.

The flaw in the Appellant's analysis, in our view, is that it fails to take into account that in a capital murder case the underlying felony is an element of capital murder. *Peacock v. State*, 783 So.2d 763 (Miss. Ct. App. 2000). The underlying felony is not a "stand - alone" offense, and indeed a defendant in a capital murder case is not being prosecuted simply for having committed the underlying felony; he is being prosecuted for having committed a homicide whilst in the course of committing the underlying felony. Were this not so, then, contrary to the law as it is now, capital murder defendants might be able to obtain lesser - included instructions on the underlying felony. The Mississippi Supreme Court has held that kidnaping is not lesser - included to capital murder. *Cannaday v. State,* 455 So.2d 713, 725 (Miss. 1984).

We have found no decision, and certainly the Appellant has found none, in which duress was available as a partial defense to a crime. Duress, from all we have seen, is an all or nothing proposition. It exists, if at all, to the whole crime, not simply an element of the crime. *Pancoast v. Commonwealth*, 2 Va. App. 28, 340 S.E.2d 836 (1986)(defense of duress not available to selected element of a crime).[2]

The Appellant cites *Milano v. State*, 790 So.2d 179 (Miss. 2001). However, in that capital murder case the underlying offense was robbery. While there was a duress instruction with respect to the separately charged felony of kidnaping, there was no such instruction sought or given with respect to the underlying offense of robbery. *Milano* does not stand as authority that a duress defense is available to the underlying offense element of capital murder.

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[2] We are quite aware that this decision is from another jurisdiction and thus is not binding upon this Court. We cite it for its persuasive value.

In *Jacobs v. State*, 870 So.2d 1202 (Miss. 2004), also cited by the Appellant, the defendant in that case was charged with capital murder. It is not clear from the opinion what the underlying offense was. It does appear, however, that a duress instruction was granted for the offense of robbery, and there is a suggestion in the opinion that robbery was the underlying offense. However, the Court in *Jacobs* was not presented with the question of whether the duress instruction was properly given. It was presented with the question of whether a lesser - included offense instruction should have been granted in light of the granting of the duress instruction. The Court simply noted that the duress instruction had been granted without considering the propriety of it. *Jacobs* does not stand as authority that the defense of duress exists as to the underlying felony element of capital murder. The Court did not address that question. In our view, the trial court in *Jacobs* erred in granting a duress instruction, but, since the error was of benefit to the defendant in that case, the Court apparently did not feel the need to address the matter.

In the event that this Court should find that the defense of duress was made out in the evidence and that the trial court erred in refusing to grant a duress instruction as to the underlying felony of kidnaping, we submit that any such error was harmless in the case at bar. It would be harmless is because the jury did, in fact, consider and reject the theory of duress in the course of resolving the armed robbery charge. There is no reason at all to suppose that the jury would have found the defense good as against the kidnaping charge notwithstanding its resolution of the armed robbery charge. Duress was in fact considered and rejected.

Duress is not a defense to capital murder, nor to an element of capital murder. The first Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A CONTINUANCE

Just prior to the commencement of trial, on 2 April 2007, Mr. Chokwe Lumumba moved the trial court for a continuance. The first ground asserted for such relief was that, due to his suspension from the practice of law by the Mississippi Supreme Court, he could not practice law and prepare for trial. He represented to the trial court that he could not effectively represent the Appellant at the time of trial.

The second ground asserted was that the State had allegedly notified the defense a week prior to trial that She intended to produce Darwin Strahan as a witness. Strahan was the person who fired the shots into Giles' head. Mr. Lumumba represented to the trial court that the defense had not been able to interview Strahan and required additional time in which to do so.

The third ground asserted was the desire to find an expert who could enquire into the Appellant's level of intelligence. Without such information in hand, it was said that the defense was not prepared to have a hearing on the defense's motion to suppress the Appellant's statements.

The trial court denied relief on the motion. It noted that the Appellant had been represented by Mr. Imhotep Alkebu-Lan since August of 2005. As for Strahan, the court indicated that it would give the defense the opportunity to interview him prior to the commencement of trial. As for the business about the Appellant's mental capacity, the court noted that there was a report concerning the Appellant's mental ability in the court file, which the defense could use in the course of the hearing on the motion to suppress statements. (R. Vol. 3, pp. 7 - 13).

As the Appellant notes, the decision to grant or deny relief on a motion for a continuance

lies in th discretion of a trial court and will not be disturbed here absent a finding that it resulted in a manifest injustice. *Easterling v. State*, 963 So.2d 49 (Miss. Ct. App. 2007). The court's decision to deny relief on the Appellant's motion for a continuance did not result in a manifest injustice.

As noted by the trial court, Mr. Alkebu-Lan had represented the Appellant since August of 2005. (R. Vol. 2, pg. 152). It seems to us that this was an entirely sufficient amount of time for Mr. Alkebu-Lan to prepare the Appellant's case for trial. The fact that Mr. Lumumba had come to grief with the State Bar, and so was unable to participate in the preparation of the case until the time of reinstatement, is a fact of little significance. It is not said that Mr. Alkebu-Lan was unable to adequately and effectively represent the Appellant, and indeed it was never said in the hearing on the motion for a continuance that Mr. Alkebu-Lan was unprepared for trial.

A review of the transcript of the record shows that the defense was well prepared for trial. While the Appellant here claims that the defense might have done a better job in its arguments in support of a duress instruction vis a vis the capital murder charge, the fact is that there was no case law to be found that would have supported its position. In the time the defense had to prepare this appeal, no case law on point favorable to it was found, so it seems. The arguments that were made in the trial court were as good as they could have been. After all, the Appellant's attorney had well nigh two years in which to research and prepare his arguments. He also had as much time to prepare a change of venue motion. Surely Mr. Alkebu - Lan does not mean to suggest that his skills in the practice of law are any less than Mr. Lumumba's.

As for the ground concerning Strahan, it does not appear that Strahan actually testified in the case. This being so, it cannot possibly be said that the Appellant was prejudiced by him.

As for the mental examination, the Appellant had submitted to one. (R. Vol. 2, pp. 156 -

164). The reason the defense wanted additional time was in order to find someone who could testify that the Appellant was the kind of person who might be easily led into making incorrect statements. However, the defense admitted that it did not have money to hire such a person. (R. Vol. 3, pp. 10 - 11).

The report was filed on 7 February 2007. (R. Vol. 2, pg. 156). We think the defense had adequate time to find someone who might testify to such a thing. But since the defense had no money to hire such a person, the point seems idle to us. In any event, since the Appellant was represented, we fail to see how or why Mr. Alkebu-Lan could not see to this.

As for the change of venue motion, we fail to see how a continuance would have affected that. That motion was made during *voir dire*, and by counsel's own statement during argument on the motion, the alleged need for a change of venue could not have been anticipated. In other words, counsel would not have been any more or less prepared for it when he made the motion.

The Appellant was represented by Alkebu-Lan from August, 2005. Trial did not occur until April, 2007. This time was more than adequate to address these issues, and Mr. Lumumba's participation was unnecessary for these issues to be presented. In any event, a review of the trial shows that Mr. Lumumba was adequately prepared. There simply was no injustice, much less manifest injustice, caused by the denial of the continuance.

The Appellant attempts to make much of the fact that the trial court did consider continuing the trial to 11 April 2007. We think that not much is to be made of this. The trial court no doubt was attempting to work with counsel – within limits. There is nothing in the record to support the Appellant's claim that the trial court knew the case had to be continued. The so - called "cogent arguments" made to the trial court are not a part of the record. They can form no basis for a decision here. *Smith v. State*, 572 So.2d 847 (Miss. 1990).

The Second Assignment of Error is without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS THE APPELLANT'S STATEMENTS

Investigator Eric Snow testified that he interviewed the Appellant on 8 July 2002 about the murder of the victim. He first read the Appellant his *Miranda* rights and gave the rights form to the Appellant to read. The Appellant signed the rights form to acknowledge that he had been advised of his rights. The Appellant orally agreed to waive those rights, but he refused to sign the waiver. The refusal to sign a waiver was not an uncommon thing to occur, according to Snow.

The Appellant then made a statement, which was recorded and later transcribed. After making this statement, but before Snow left the interrogation room, the Appellant said something to the effect that he wished to tell the truth. Snow reminded the Appellant that he had been advised of his rights. The Appellant made his second statement. In this statement he admitted his role in the murder of Giles.

Snow testified that he did not know the Appellant, did not know whether the Appellant was or had been a special education student or whether the Appellant had difficulty reading. He did state that the Appellant appeared to understand what had been read to him. (R. Vol. 3, pp. 14 - 36).

Detective Larry Davis testified that he was not present when the Appellant was advised of his rights. The Appellant was under arrest at the time he gave his statements. (R. Vol. 3, pp. 36 - 44).

Detective Thomas Ervin testified that he was present when during part of the Appellant's interview. He knew nothing of what had transpired during the interview that occurred before he

entered the interview room. (R. Vol. 3, pp. 45 - 49).

The Appellant testified. He said that he had been a special education student, suffered from dyslexia, and never been arrested before or advised of his *Miranda* rights, and that he could read if the letters were large. He claimed that he did not understand what was going on when he was interviewed. He stated that he could not remember whether he was given his *Miranda* rights. He did not testify, however, that he refused to consent to a waiver of the *Miranda* rights. (R. Vol. 3, pp. 50 - 52).

In argument to the trial court, the Appellant asserted that he had dyslexia, poor reading skills and an IQ of 73. It was said that he was probably incapable of understanding the rights that were read to him. It was further asserted that there was no consistent evidence that the rights were read to him at all. (R. Vol. 3, pp. 54 - 57). While the Appellant noted that the waiver or rights section of the rights form was not signed, he did not assert that there was, in fact, no waiver of his rights.

Here, the Appellant's argument is that there was no waiver.

Where a defendant seeks to have his incriminating statement or confession suppressed, it is incumbent upon the State to establish beyond a reasonable doubt that the statement or confession was voluntarily made without the exercise of coercion, promises of lenity, or other inducements. So long as the trial court employs the correct legal standards, this Court will not overturn the decision of the trial court to admit the statement or confession unless that decision is clearly erroneous. *Divine v. State*, 947 So.2d 1017 (Miss. Ct. App. 2007).

As for whether the Appellant was actually informed of his rights, Snow testified that he was. This testimony was corroborated by the fact that the advice form had been signed by the Appellant.

As for whether the Appellant understood the rights as expressed upon the form, the Appellant's reading problems were of no consequence. The rights were read to the Appellant and he indicated that he understood them. While the Appellant claimed that he did not know what was going on when he was being interviewed, this self-serving claim is belied by the answers he gave to questions put to him by Snow. In any event, there was nothing observed by Snow to indicate that the Appellant was incapable of understanding his rights.

As for whether there was a waiver, Snow testified that the Appellant orally waived his rights but refused to sign the waiver part of the rights form. This was not an uncommon practice. Interestingly, the Appellant did not testify that he did not waive his rights. Thus, Snow's testimony on this point stands uncontradicted. An oral waiver of the *Miranda* rights is sufficient to waive those rights. *Hodge v. State*, 801 So.2d 762, 771 (Miss. Ct. App. 2001).

The Appellant attempts to make much of the fact that the reading and waiver of the rights were not recorded at the commencement of the first statement. It does not appear that they were, but then it may have been that Snow saw no purpose in activating the recording device until the Appellant waived his rights and agreed to speak. In any event, this fact was a matter that simply went to Snow's credibility Given the fact that the Appellant did not deny having waived his rights and the fact that there was a signed acknowledgment form, we think this point made by the Appellant is of little consequence.

The Appellant then points out that he was told that he was lying at the end of the first statement. Perhaps so, but there was no foul in this. This was not a threat. *Melton v. State*, 771 So.2d 1010 (Miss. Ct. App. 2000)(Appellant claimed his confession was coerced because, *inter alia*, he was told that he was lying during custodial interrogation. The Court did not regard that claim as being among those that potentially could arise to coercion). We perceive no harm,

either, in the officer telling the Appellant that he knew what happened.

The Appellant says that he was not given his rights just before the second statement. This was not necessary. The first statement had just been concluded, the Appellant had not even left the interrogation room. He volunteered to make a second statement. Snow reminded the Appellant of the rights he had previously read to him. This was sufficient.

The Appellant claims that he has a low intelligence quotient. However, a confession is not to be suppressed simply because the individual involved is mentally weak. Low intelligence is but one factor to be considered, and it is only where the facts clearly show that a mentally weak person has been overreached that a confession should be suppressed. *Martin v. State*, 871 So.2d 693 (Miss. 2004)(Involving an accused with an IQ of 60). Here, there was no testimony to demonstrate that the Appellant was overreached. He was not taken advantage of. There were no threats employed against him. There were no tricks played against him. The fact that the officer told the Appellant that he did not believe the Appellant and that the officer said that he knew what happened do not constitute overreaching.

The decision to admit the Appellant's confessions to evidence was not clearly erroneous. The Third Assignment of Error is without merit.

4. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION FOR A CHANGE OF VENUE

After the venire was qualified by the trial court and several members excused for various reasons not having to do with the Appellant or the facts of the case at bar, *voir dire* began. During this process, no one indicated that he believed that the Appellant was guilty because he had been indicted. One individual informed the court that he was the victim's uncle. Another person indicated that she had a niece who was related to the victim. No one indicated that he was

a friend of the Appellants'; no one else indicated that he was related to the Appellant.

Another venireman indicated that he was a close friend of the victim's brother. Three or four three others indicated that they had known the victim or his family. These people did not think that they could lay aside their relationship with the victim and hear the case impartially. (R. Vol. 3, pp. 75 - 81).

One venireman indicated that he had heard something about the case and felt that he could not be impartial. (R. Vol. 3, pp. 88 - 89). Another indicated that he had read something in the newspaper and felt that he could not be fair. (R. Vol. 3, pg. 89).

The others on the venire did not indicate that they had knowledge of the case, and did not indicate that they could not be impartial in the hearing of the case. They affirmatively indicated that they could follow the law given to them by the judge, and would base their verdict on the evidence presented to them. (R. Vol. 3, pp. 92 - 93).

Three venireman were related to or knew the victim. (R. Vol. 3, pg. 95). A number of others indicated that they had personal or health problems that might prevent them from devoting their full attention to the case; several indicated that, due to their religious or personal beliefs, they could not sit in judgment on another person. (R. Vol. 3, pp. 93 - 108). Several others had personal reasons of one kind or another which they believed would prevent them from being able to hear the case impartially or pay attention to the case. (R. Vol. 3, pp. 122 - 126).

Twelve veniremen stated that they knew Strahan. Of these, six also knew the victim. (R. Vol. 3, pg. 132). Two people realized that they had read something about the case in the newspaper, but neither indicated that they had formed an opinion in the case. (R. Vol. 3, pp. 141 - 143).

Before the defense finished its *voir dire*, it moved for a change of venue. It claimed that

there were thirty members of the venire who were challengeable for cause. (R. Vol. 3, pp. 148 - 149). The trial court reserved ruling on this motion, pending completion of *voir dire*.

In completing this process, a number of veniremen or members of their family had been victims of crimes; others knew members of law enforcement. Except those who had previously indicated reservations concerning their ability to be impartial, none of the remaining ones indicated any trouble with following the law. (Vol. 4, pp. 150 - 204).

The defense renewed its motion for a change of venue, alleging that even though there would be enough veniremen from which to choose a jury, assuming that twenty nine were struck for cause, there was good cause to believe that a fair jury could not be chosen. The prosecutor pointed out that most of the said - to -be cause challenges were apparently based upon normal and mostly casual associations and that the Appellant, not being from Yazoo County, was not known.

The trial court found that there were seventy three persons summoned to jury duty in the case at bar. Of these, fourteen were excused on account of exemptions. Of the remaining fifty - nine, thirteen stated that they could not be impartial, leaving an available pool of forty - six persons. The court found that the percentage of those who could not be impartial was not great enough to require a change of venue, and so denied relief on the Appellant's motion. (R. Vol. 4, pp. 206 - 233).

Here, the Appellant takes issue with the trial court's ruling and claims that to summon seventy - three people to jury duty is too small a number for a capital murder case. He claims that close to a third of the veniremen were disqualified.

First of all, the Appellant has not supported this claim with argument and citation to authority. He has simply made the assertion. The issue is thus abandoned. *Puckett v. State*, 879

So.2d 920, 932 (Miss. 2004).

The decision to grant or deny a change of venue is left to the sound discretion of a trial court. Its decision will not be disturbed here absent a showing that the trial court clearly abused its discretion. *Jackson v. State*, 962 So.2d 649 (Miss. Ct. App. 2007). The Appellant has failed to make any such showing here.

The trial court found that only thirteen of the seventy three jurors expressed doubt about their ability to be impartial. The *voir dire* demonstrates that, outside of family and close friends, the veniremen did not know much, if anything about the case. There was simply nothing demonstrated to show that the case was notorious or that there was high feeling against the Appellant. There was no evidence of extensive pre - trial publicity.

We find nothing in the *voir dire* that strikes us as being out of the ordinary in the trial of a criminal case in a mostly rural county. It is common to see relationships of all descriptions between veniremen, witnesses, victims and the accused. Those veniremen who had close relationships were forthright about them. There is nothing to demonstrate that an impartial jury was not selected, or could be selected; the trial court did not clearly abuse its discretion in denying relief on the Appellant's motion.

There is no law of which we are aware to support the claim that seventy three veniremen are too few to summon in a capital murder case in which the death penalty is not sought. Nor (holding aside the rare instance in which challenges result in a venire with an insufficient number from which to choose a jury) is there authority of which we are aware to the effect that there is a certain percentage of veniremen who must remain after challenges are exercised. The Appellant apparently knows of none. It is his burden to demonstrate these claims. *Colburn v. State*, No. 2005-KA-01882-COA (Miss. Ct. App. Decided 29 January 2008, Not Yet Officially Reported)

The Fourth Assignment of Error is without merit.

5. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

The Appellant, tediously, reasserts his first four assignments of error under a claim that there was cumulative error committed in the case at bar. We have demonstrated that there was no error individually. That being so, there can be no cumulative error. In any event, we incorporate here, as our response to the Appellant's Fifth Assignment of Error, the arguments made above in response to his first four assignments of error.

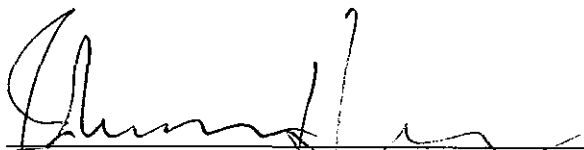
The Fifth Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

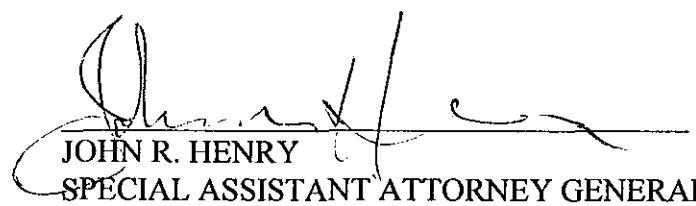
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Jannie M. Lewis
Circuit Court Judge
P. O. Box 149
Lexington, MS 39095

Honorable James H. Powell, III
District Attorney
P. O. Box 311
Durant, MS 39063

Imhotep Alkebu-Lan, Esquire
Attorney At Law
P. O. Box 31107
Jackson, MS 39286-1107

This the 3rd day of March, 2008.



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